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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Advanced Television Systems
and Their Impact Upon the
Existing Television Broadcast
Service

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) MM Docket No. 87-268
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REPLY COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

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REPLY COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

Comcast Cable Communications, Inc. ("Comcast") hereby submits its reply comments regarding the Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

What began as a proceeding aimed at fostering the development of "high definition television" has been transformed by technological developments into a proceeding about "digital broadcast television." As the Commission has noted, the digital technology that has been developed for the provision of high definition television can be used to transmit a wide range of services: "Rather than being limited to transmitting one HDTV service, a fully digital system, such as that developed by the Grand Alliance, can provide one HDTV service, several SDTV

services, or a host of non-broadcast services alone or in combination with broadcast services."^{1/}

One issue that is of overriding concern to Comcast is whether and to what extent cable operators should be required by the Commission to carry the digital signals transmitted by local broadcasters. The answer to this question is grounded, in the first instance, in the "must-carry" provisions of the Communications Act of 1934, as amended. Unless those provisions specifically authorize the Commission to mandate carriage of the signals at issue, the Act generally prohibits the Commission from doing so. As several commenting parties have pointed out, the Act does not compel or authorize rules requiring cable operators to carry two signals -- NTSC and digital -- provided by a single broadcaster.

Second, even if the "must-carry" provisions of the Act could be read to authorize the Commission to require carriage of digital signals, any such requirement must be compatible with the First Amendment. There can be little doubt, given the Supreme Court's rulings to date, that requiring the carriage of each broadcaster's digital signal in addition to its NTSC signal would be struck down under the First Amendment balancing test that has been set forth by the Court.

Finally, even if the Commission had discretion to require cable operators to carry broadcasters' digital signals in

^{1/} Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry, ¶ 16 ("Fourth Further Notice").

addition to their NTSC signals, such a requirement would not serve the public interest. The range of potential video and non-video services that might be delivered in digital form to cable subscribers is today beyond imagination. Forcing cable operators to carry broadcasters' digital signals -- in the standardized format selected now by the Commission -- would unwisely and unfairly interfere with the marketplace development of such services and prematurely cut off development of the optimal technology for digital delivery.

I. THE STATUTE NEITHER REQUIRES NOR AUTHORIZES SIMULTANEOUS MANDATORY CARRIAGE OF A BROADCASTER'S NTSC AND DIGITAL SIGNALS.

Section 624(f)(1) of the Act provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title."^{2/} This means that unless Title VI specifically authorizes or requires the Commission to force cable operators to carry the NTSC and digital signals of local broadcasters, the Commission may not do so. Neither the must-carry provisions of Sections 613 and 614 nor any other provisions of Title VI authorize or require such mandatory dual carriage.

Section 614(b)(4)(B) deals specifically with the manner in which the Commission is to apply the Act's must-carry

^{2/} 47 U.S.C. § 544(f)(1).

requirements if and when the standards for broadcast television signals are changed from the existing NTSC standards:

ADVANCED TELEVISION. — At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.^{3/}

The language of this provision makes clear that must-carry rights attach only to broadcast signals that have been changed from the existing NTSC format to a new advanced television format approved by the Commission -- and not to advanced television signals that are provided by broadcast stations in addition to their existing NTSC signals. So long as a broadcaster continues to provide an NTSC signal, only that (unchanged) signal can qualify for mandatory carriage. And because the broadcaster's additional digital signal does not qualify for mandatory carriage under Section 614, the Commission is prohibited by Section 624 from forcing cable operators from carrying it.

^{3/} 47 U.S.C. § 534(b)(4)(B) (emphasis added).

II. THERE IS NO CONSTITUTIONAL BASIS FOR COMPELLING CABLE OPERATORS TO CARRY BROADCASTERS' DIGITAL SIGNALS IN ADDITION TO THEIR NTSC SIGNALS.

The Supreme Court has cast considerable doubt on the constitutionality of requiring cable operators to carry the existing NTSC signals of local broadcasters. In Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994), the Court held that such a requirement adversely affected the protected speech of cable operators and non-broadcast cable programming services and was subject to a heightened, intermediate level of First Amendment scrutiny. In applying such scrutiny,

we must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate interests.^{4/}

On the basis of the limited evidence available to it, a majority of the Court was "unable to conclude that the Government ha[d] satisfied either inquiry."^{5/} Indeed, four of the Justices

^{4/} Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2470 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

^{5/} Id.

in that majority believed that the must-carry rules were content-based and should have been subjected to "strict scrutiny." To survive such scrutiny, the rules would have had to have been "narrowly tailored to a compelling state interest" -- a standard that, in the view of the four Justices, the government could not meet.

On remand to the three-judge district court, only one of the judges found that the evidence adduced by the parties after a year of discovery was clearly sufficient to sustain the rules under the intermediate scrutiny test mandated by the Supreme Court. While Judge Sporkin found substantial evidence in the record compiled by Congress and produced during the remand proceedings to support Congress's "inferences that the must-carry regulations were necessary to protect the economic health of the broadcast industry and that the burden to [the] cable industry imposed by the regulations would not be substantial,"^{6/} Judge Williams found it "clear that must-carry is not narrowly tailored to address any government interests that are actually at stake" and that "[t]he must-carry provisions burden substantially more speech than necessary to advance the government's interests."^{7/} Judge Williams found no evidence of any threat to the economic viability of broadcasting in the absence of must-carry and, while he found the evidence unclear as to the likelihood that cable

^{6/} Turner Broadcasting v. FCC, Civ. Action No. 92-2247, slip op. at 43.

^{7/} Id., dissenting opinion of Circuit Judge Williams at 2.

operators would refuse to carry local broadcast stations for anticompetitive reasons, he concluded that any such conduct could be adequately prevented or remedied through more narrowly tailored means, such as leased access requirements.^{8/}

Thus, it clearly remains a close call at best whether must carry rules that require carriage of broadcasters' existing NTSC channels can survive even intermediate scrutiny in the Supreme Court. Equally clearly, in light of the opinions and findings of the Supreme Court and the three-judge District Court, it is not a close call at all whether requiring cable operators to carry, concurrently, not only the broadcasters' existing NTSC signals but also new, digital signals would be upheld. Such a requirement would substantially add to the burdens that the must-carry rules already impose on cable operators and cable programmers. And it would do so without in any way furthering the ostensible purposes of the must-carry rules. While there may be disagreement over the extent of the supposed threat to the availability and viability of free, over-the-air broadcasting in the absence of must-carry rules, there is no reason at all to believe that such a threat will continue even after cable operators are required to carry most local broadcasters' existing signals.

^{8/} Judge Jackson did not believe that either side was entitled to summary judgment based on the record before the court. But because both of his colleagues believed that summary judgment was appropriate (albeit for opposite parties), he was reluctant to force the case to trial. Therefore, "in order that the case be decided," he "elect[ed] to concur with District Judge Sporkin." Id., concurring opinion of Judge Jackson at 1.

Requiring cable operators to set aside capacity for each broadcaster's second signal would obviously compound the must-carry burden on cable operators and programmers, whether the digital signal (1) is merely passed through in digital form to subscribers,^{9/} (2) is demodulated, demultiplexed and recombined into a higher data rate digital signal,^{10/} or (3) is converted and provided to subscribers in analog form.^{11/} The first two alternatives would require the activation of another 6 MHz channel -- or the displacement of services that the cable operator would otherwise choose to carry -- adding expenses and infringing on the operator's editorial discretion.

This would also be the case if the cable operator were to provide the digitized programming in analog form -- to the extent that broadcasters use their additional signal to provide one channel of high-definition or standard video programming.^{12/} In that case, the cable operator would only have to use up one extra channel to provide the high definition programming in NTSC analog form. But broadcasters and the Commission now contemplate the

^{9/} See, e.g., Broadcasters' Comments at 33 n.39.

^{10/} See, e.g., Comments of General Instrument Corporation at 19.

^{11/} See Fourth Further Notice, ¶ 82.

^{12/} The law requires that cable operators carry "the primary video, accompanying audio, and line 21 closed caption transmission" of each station, but provides that "[r]etransmission of other material in the vertical blanking interval or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator." 47 U.S.C. § 534(b)(3)(B).

use of digital signals to provide not only high definition television but also multiple "channels" of standard definition programming. If cable operators are required to provide all this programming in analog form to subscribers, the burden on their channel capacity will be similarly multiplied, at least until the statutory ceiling on the percentage of channels to be set aside for must-carry is reached. Moreover, to the extent that broadcasters switch back and forth from providing high definition programming to providing multiple channels of standard programming, the burden on cable operators in dealing with these switches on their basic tiers ^{13/} (and the confusion inflicted on cable subscribers) will be enormous.

The imposition of these additional substantial burdens on cable operators and subscribers is in no way necessary or useful in furthering the purposes of the must-carry rules. Requiring carriage of even a single broadcast channel is more than sufficient to protect against any conceivable threat to the viability and availability of over-the-air broadcasting. Giving broadcasters another 6 MHz of free spectrum would further subsidize them and protect them from marketplace competition -- and would, in fact, reduce the need for (and constitutionality of) even the existing one-channel must-carry requirements.

^{13/} Because the costs of complying with carriage of digital broadcast signals would be associated with basic service, the regulated rates for basic service would inevitably rise considerably to reflect those costs.

No other programmers have free, over-the-air access to all homes in a community. And no other programmers have guaranteed access to even a single channel on cable systems or other multichannel video programming distribution systems. Requiring carriage of a second, digital broadcast signal -- even if it requires only a single 6 MHz channel on the system -- would give broadcasters an additional unwarranted competitive advantage over non-broadcast programmers. And it would further interfere with the ability of cable operators to compete effectively in the video marketplace by offering programming that best meets the needs and demands of television viewers.

To justify such an intrusion on the First Amendment interests of operators, programmers and viewers, the Commission would have to demonstrate that the mandatory carriage of broadcasters' existing NTSC channels is insufficient to protect the availability of over-the-air broadcasting. There is a strong likelihood that the Supreme Court will hold that even the existing mandatory carriage requirements serve no substantial governmental interest. It is inconceivable that the Court could conclude that requiring carriage of a second channel would serve any such purpose.

III. EXTENDING MUST-CARRY REQUIREMENTS TO BROADCASTERS' DIGITAL SIGNALS WOULD BE CONTRARY TO THE PUBLIC INTEREST.

In just a short period of time, the objectives of this proceeding have changed dramatically. Initially, the

Commission's purpose was to foster the development of high definition television. Now, it seems to be to promote the development of digital television. The reason for this change -- the rapid and unpredictable evolution of technology and competition in the video marketplace -- is precisely the reason why extending must-carry to digital broadcast signals would be so contrary to the public interest.

At least two things that are clear today were not so obvious when the Commission began its "high definition" proceeding. First, there will be competition among multichannel providers of video programming, as well as among program services. Direct broadcast service (DBS) is finally a reality; DirectTV, USSB, and PRIMESTAR are competing vigorously for subscribers, and more players will soon join the fray. Multichannel multipoint distribution service (MMDS or "wireless cable") is gaining in strength; several local exchange carriers have not only indicated an intention to use wireless cable as their initial means of entering the video marketplace but have invested millions of dollars in wireless systems.^{14/} Other phone companies are acquiring cable franchises and providing "video dialtone" systems in direct competition with existing cable operators. And local broadcasters, with the advent of digital broadcasting, will themselves become multichannel video programming distributors.

Second, there will be digital television, and it will

^{14/} Indeed, the Commission's own figures show that MMDS subscribership has doubled since 1993. See Second Annual Report, CS Docket No. 95-61, ¶ 69 (rel. Dec. 11, 1995).

ultimately be provided by all the competitors in the video marketplace. Comcast fully intends to take advantage of the technological capabilities of digital television as it deploys its portion of the national information infrastructure -- and eventually all television (and telecommunications) services are likely to be provided digitally. For broadcasting to play a role in the television of the future, it, too, will need to adapt to the digital world.

But to say that the future of television is digital is not to say that either the optimal technology or the optimal distribution media have yet been determined. To the contrary, as Tele-Communications, Inc. has pointed out in its comments,

various cable operators have made substantial investments in digital technology and are currently experimenting with diverse network topologies for delivering interactive digital TV. DBS operators have already launched digital video systems and sold over one million digital satellite receivers to consumers. Telcos continue to explore various video platforms, including Asymmetric Digital Subscriber Line, hybrid fiber coax, or switched digital video. MMDS operators will soon implement digital compression in their systems.^{15/}

Each operator is seeking a digital approach that best combines the needs of its own distribution technology with the circumstances of the marketplace. Ultimately, the marketplace will determine the successful distributors and successful digital technology (or technologies), based on a wide variety of factors

^{15/} Comments of Tele-Communications, Inc. at 21-22 (footnote omitted).

that include quality of the transmission, number and types of services provided, price, convenience, marketing, and customer service.

Requiring cable operators to carry the digital signals of broadcasters would not only preempt this natural selection process but would produce results that in no way resemble what the marketplace would be likely to produce. A must-carry requirement, by guaranteeing broadcasters access to cable systems regardless of the digital technology that they choose, would essentially enable broadcasters to dictate a digital standard for the industry based on their needs alone -- not on the needs of other distributors, on the relative quality of their technology, or on the needs and demands of consumers. No regulatory standard for digital broadcasting that the Commission might adopt at this time is likely to replicate perfectly what the marketplace would produce. But it would be especially inappropriate to force or favor the adoption of the technology that seems at this time most suitable for broadcast distribution -- since the majority of the nation's television viewers receive their programming by means other than over-the-air broadcast reception.

In sum, must-carry requirements, insofar as they promote adoption of an industry-wide digital standard based on the unique characteristics and preferences of the broadcasting industry do not serve the public interest. Moreover, as discussed in the previous section, extending must-carry rights to broadcasters' digital signals would also interfere with competition among video

programming services and distributors by granting broadcasters unique, guaranteed access to scarce cable channels. Neither the broadcasters' chosen digital technology nor their programming necessarily best meets the desires and demands of consumers, and it is not in the public interest to adopt or extend must-carry requirements in a way that artificially promotes either one.

CONCLUSION

For the foregoing reasons, the Commission should not require cable operators to carry any digital signals that broadcasters may in this proceeding be authorized to transmit. Such a requirement would be beyond the scope of the Commission's statutory jurisdiction. It would fail to survive First Amendment scrutiny under the standards established by the Supreme Court. And, by interfering with the marketplace evolution and selection of how -- and by whom -- video programming is to be provided, it would be contrary to the public interest.

Respectfully submitted,

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